September 2021

Decision in CPLR Article 78 proceedings - Graham, Frank (2007-03-30)

[*1]

Matter of Graham v New York State Bd. of Parole
2007 NY Slip Op 51222(U) [16 Misc 3d 1101(A)]
Decided on March 30, 2007
Supreme Court, Albany County
Ceresia, J.
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Decided on March 30, 2007

Supreme Court, Albany County

In The Matter of Frank Graham, Petitioner,

against

New York State Board of Parole, Respondent,

6547-06

Appearances:

Frank Graham

Inmate No. 79-A-2961

Petitioner, Pro Se

Livingston Correctional Facility

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George B. Ceresia, J.

The petitioner, an inmate at Livingston Correctional Facility, has commenced the instant CPLR Article 78 proceeding to review a determination of respondent made on November 9, 2005 to deny petitioner discretionary release on parole. Petitioner is currently serving two concurrent terms for Murder 2nd degree and Criminal Possession of Weapon 2nd degree. He argues that the Parole Board relied upon incorrect information in reaching its determination, including the contention that he had absconded from police custody while being questioned in connection with the instant offense, and then fled to California. He maintains that he is above the guideline range (*see* 9 NYCRR 8001.3 [c]). He cites a number of his institutional and programming accomplishments, including obtaining an Associates Degree from Cayuga Community College, Cayuga County, New York, and maintaining a 3.63 grade point average at State University of New York (New Paltz). He indicates that he has completed the Aggression Replacement Training Program, the Alternative To Violence Project and the Alcoholic Substance Abuse Treatment Program. He has also obtained a number of certificates. He maintains that the Parole Board's decision includes "a long, labored and inflammatory recounting of the instant offense" and is based exclusively on the seriousness of the offense for which he is incarcerated. He indicates that he is approaching 64 years of age. He maintains that the Parole Board failed to consider the transcript of his sentencing. Petitioner further argues that the Parole Board improperly followed an executive policy under which parole is denied to violent felony offenders.

The reasons for the respondent's determination to deny petitioner release on parole are set forth as follows:

"After a review of the record and this interview, parole is denied. The instant offense, Murder 2nd and Criminal Possession of a Weapon 2nd, involved your approaching a victim after the victim was returning from a local bank with a company payroll. The victim attempted to flee and you pursued him firing two shots. The victim was struck and fell to the street. You then shot the victim two more times and fled the scene in a vehicle driven by an unapprehended individual. After being taken into custody, you absconded from the police station and fled to the state of California. Where you remained for approximately three years, until being stopped for a traffic violation and found to be wanted for the instant offense. This crime represents an escalation of your anti-social behavior, including Petit Larceny, Assault and Attempted Possession of a Weapon. Your institutional programming and receipt of approximately five Tier II misconduct reports is noted and considered. Your callous brutal assault of your victim, your propensity for violence, in addition to your indifference to the law, leads this Panel to determine that your release is inappropriate as it would deprecate the seriousness of the crime and serve to undermine respect for the law. Above the guidelines due to sentence." [*2]

As stated in Executive Law §259-i (2) (c) (A):

"Discretionary release on parole shall not be granted merely as a reward for good conduct or efficient performance of duties while confined but after considering if there is a reasonable probability that, if such inmate is released, he will live and remain at liberty without violating the law, and that his release is not incompatible with the welfare of society and will not so deprecate the seriousness of his crime as to undermine respect for law. In making the parole release decision, the guidelines adopted pursuant to subdivision four of section two hundred fifty-nine-c of this article shall require that the following be considered: (i) the institutional record including program goals and accomplishments, academic achievements, vocational education, training or work assignments, therapy and interpersonal relationships with staff and inmates; (ii) performance, if any, as a participant in a temporary release program; (iii) release plans including community resources, employment, education and training and support services available to the inmate; (iv) any deportation order issued by the federal government against the inmate []; (v) any statement made to the board by the crime victim or the victim's representative []" (Executive Law §259-i [2] [c] [A]).

"Parole release decisions are discretionary and, if made pursuant to statutory requirements, not reviewable" (*Matter of Sinopoli v New York State Board of Parole*,189 AD2d 960, 960 [3rd Dept., 1993], citing *Matter of McKee v New York State Bd. of Parole*, 157 AD2d 944). If the parole board's decision is made in accordance with the statutory requirements, the board's determination is not subject to judicial review (*see Ristau v. Hammock*, 103 AD2d 944 [3rd Dept., 1984]). Furthermore, only a "showing of irrationality bordering on impropriety" on the part of the Parole Board has been found to necessitate judicial intervention (*see Matter of Silmon v Travis*, 95 NY2d 470, 476 [2000], quoting *Matter of Russo v. New York State Bd. of Parole*, 50 NY2d 69, 77 [1980]). In the absence of the above, there is no basis upon which to disturb the discretionary determination made by the Parole Board (*see Matter of Perez v. New York State of Division of Parole*, 294 AD2d 726 [3rd Dept., 2002]).

The Court finds that the Parole Board considered the relevant criteria in making its decision and its determination was supported by the record. A review of the transcript of the parole interview reveals that, in addition to the instant offense, attention was paid to such factors as petitioner's institutional programming, his disciplinary record, and his plans upon release. The decision was sufficiently detailed to inform the petitioner of the reasons for the denial of parole and it satisfied the requirements of Executive Law §259-i (*see Matter of Whitehead v. Russi*, 201 AD2d 825 [3rd Dept., 1994]; *Matter of Green v. New York State Division of Parole*, 199 AD2d 677 [3rd Dept., 1993]). It is proper, and in fact required, that the Parole Board consider the seriousness of the inmate's crimes and their violent nature (*see Matter of Weir v. New York State Division of Parole*, 205 AD2d [*3]906, 907 [3rd Dept., 1994]; *Matter of Sinopoli v. New York State Board of Parole*, 189 AD2d 960, *supra*; *Matter of Dudley v Travis*, 227 AD2d 863, [3rd Dept., 1996), as well as the inmate's criminal history (*see Matter of Farid v Travis*, 239 AD2d 629 [3rd Dept., 1997]; *Matter of Cohen v Gonzalez*, 254 AD2d 556 [3rd Dept., 1998]). The Parole Board is not required to enumerate or give equal weight to each factor that it considered in determining the inmate's application, or to expressly discuss each one (*see Matter of Farid v Travis*, *supra*; *Matter of Moore v New York State Bd. of Parole*, 233 AD2d 653 [3rd Dept., 1996]; *Matter of Collado v New York State Division of Parole*, 287 AD2d 921 [3rd Dept., 2001]). Nor must the parole board recite the precise statutory language set forth in the first sentence of Executive Law § 259-i (2) (c) (A) (*see Matter of Silvero v Dennison*, 28 AD3d 859 [3rd Dept., 2006]). In other words, "[w]here appropriate the Board may give considerable weight to, or place particular emphasis on, the circumstances of the crimes for which a petitioner is incarcerated, as well as a petitioner's criminal history, together with the other statutory factors, in determining whether the individual will live and remain at liberty without violating the law,' whether his or her release is not incompatible with the welfare of society,' and whether release will deprecate the seriousness of [the] crime as to undermine respect for [the] law'" (*Matter of Durio v New York State Division of Parole*, 3 AD3d 816 [3rd Dept., 2004], quoting Executive Law §259-i [2] [c] [A], other citations omitted).

With respect to petitioner's argument that he has served time in excess of the guideline range (*see*, 9 NYCRR 8001.3), the guidelines "are intended only as a guide, and are not a substitute for the careful consideration of the many circumstances of each individual case" (*see*, 9 NYCRR 8001.3 [a]; *Matter of Tatta v State of New York Division of Parole*, 290 AD2d 907, 908 [3rd Dept., 2002]). Thus, the Court finds that this does not serve as a basis to overturn the Board's decision.

In addition, the Parole Board's decision to hold petitioner for the maximum period (24 months) is within the Board's discretion and was supported by the record (*see*, *Matter of Tatta v State of New York, Division of Parole*, 290 AD2d 907 [3rd Dept., 2002], *lv denied* 98 NY2d 604).

The record does not support petitioner's assertion that the decision was predetermined consistent with an alleged executive branch policy mandating denial of parole to all violent felony offenders. The Court, accordingly, finds no merit to the argument (*see Matter of Lue-Shing v Pataki*, 301 AD2d 827, 828 [3rd Dept., 2003]; *Matter of Perez v State of New York Division of Parole*, 294 AD2d 726 [3rd Dept., 2002]; *Matter of Jones v Travis*, 293 AD2d 800, 801 [3rd Dept., 2002]; *Matter of Little v Travis*, 15 AD3d 698 [3rd Dept., 2005], *Matter of Wood v Dennison*, 25 AD3d 1056 [3rd Dept., 2006]).

With respect to petitioner's argument that the Appeals Unit failed to issue a timely decision, the Court observes that such a failure does not operate to invalidate the underlying administrative decision. The sole consequence is to permit the petitioner to [*4]deem his or her administrative remedy to be exhausted, and enable the petitioner to immediately seek judicial review of the underlying determination (*see* 9 NYCRR § 8006.4 [c]; *Graham v New York State Division of Parole*, 269 AD2d 628 [3rd Dept, 2000], lv denied 95 NY2d 753; *People ex rel. Tyler v Travis*, 269 AD2d 636 [3rd Dept., 2000]).

The failure of the Appeals Unit to render a decision within four months operates only to permit petitioner to resort to intermediate judicial review without being met with a defense of failure to exhaust administrative remedies (*see*, 9 NYCRR § 8006.4 [c]; *see also*, *Matter of Lord v State of New York Executive Department Board/Division of Parole*, 263 AD2d 945 [3rd Dept., 1999], *lv denied* 94 NY2d 753; *Matter of Tyler v Travis*, 269 AD2d 636, *supra*). Thus the Court determines that petitioner has not been deprived of a constitutional or statutory right.

As noted, petitioner argues that the Parole Board relied upon erroneous information in rendering its determination. He does not deny, however, that he left the police station under the guise of going to the rest room while being questioned in connection with the murder of his victim.

Petitioner's claims that the determination to deny parole is tantamount to a re-sentencing are conclusory and without merit (*see Matter of Bockeno v New York State Parole Board*, 227 AD2d 751 [3rd Dept., 1996]; *Matter of Crews v New York State Executive Department Board of Appeals Unit*, 281 AD2d 672 [3rd Dept., 2001]; *Matter of Evans v Dennison*, 13 Misc 3d 1236A, [Sup. Ct., Westchester Co., 2006]). Moreover, it is well settled that the Parole Board is vested with the discretion to determine whether release was appropriate notwithstanding the fact that the sentencing court set this as the minimum term of petitioner's sentence (*see Matter of Silmon v Travis*, 95 NY2d 470, 476 [2000]; *Matter of Cody v Dennison*, 33 AD2d 1141, 1142 [3rd Dept., 2006] *lv denied* 8 NY3d 802 [2007]).

With regard to the Parole Board's failure to consider the sentencing minutes, the Court observes that only the relevant statutory directive requires that the Parole Board consider the *recommendations* of the sentencing court (*see* Executive Law 259-i [2] [c] [A] last sentence, which makes reference to the provisions of Executive Law § 259-i [1] [a]). While the Court is mindful of the decisions in *Matter of McLaurin v New York State Board of Parole* (27 AD3d 565 [2nd Dept., 2006], *lv to appeal denied* 7 NY3d 708) and *Matter of Standley v New York State Division of Parole* (34 AD3d 1169 [3rd Dept., 2006]), the petitioner acknowledges in the petition that the sentencing court did not make any recommendations. For this reason, the Court finds that petitioner's argument has no merit.

The Court has reviewed petitioner's remaining arguments and finds them to be without merit.

The Court finds the decision of the Parole Board was not irrational, in violation of lawful procedure, affected by an error of law, irrational or arbitrary and capricious. The [*5]petition must therefore be dismissed.

Accordingly, it is

ORDERED and ADJUDGED, that the petition be and hereby is dismissed.

This shall constitute the decision, order and judgment of the Court. All papers are returned to the attorney for the respondent who is directed to enter this Decision/Order/Judgment without notice and to serve petitioner with a copy of this Decision/Order with notice of entry.

ENTER

Dated:March 30, 2007S/_____

Troy, New YorkSupreme Court Justice

George B. Ceresia, Jr.

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